

IPR-Review**Vol. 2 No. 02, July 2019, pp 119-126****FUNCTION OF NOTARY DEED IN IPR LICENSE ; FIDUCIARY PERSPECTIVE****Dian Cahayani and Merlin Swantamalo Magna**

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This study aims to analyze the function of a notary deed in an intellectual property rights (IPR) license based on a fiduciary perspective. This type of research is normative legal research by examining secondary data that comes from principles and theories as well as laws and regulations. The data collection method is done by studying literature such as regulations, books, documents or other writings to support this research. The collected data were then analyzed qualitatively using data analysis methods. Based on the results of this study, it can be concluded that the notary has the authority to make a fiduciary guarantee deed. Law Number 28 of 2014 concerning Copyright (Copyright Law) has accommodated the provisions of the Copyright guarantee as an object of fiduciary guarantee. However, in practice, Copyright, which is an intangible movable object, is still difficult to accept as fiduciary security in financial institutions in Indonesia. This is because it is not easy to evaluate the economic value of the copyright.

Keywords : Notary Deed, Intellectual Property Law License (HKI), Fiduciary**A. Preliminary**

Economic growth in Indonesia continues to increase every year. The increasing economic growth is of course driven by the existence of economic development in all sectors of social life. The economic development that the Government of Indonesia always strives for must be based on the values in Pancasila and the 1945 Constitution of the Republic of Indonesia. This is intended so that every element of economic development activities is capable of creating a just, prosperous and prosperous society. One of the economic development that is currently being promoted by the government is the existence of creative economic activities that are able to increase economic growth and create new jobs in Indonesia. The development of the creative economy that is currently happening in Indonesia is able to encourage someone to have high productivity in order to produce creative works that can provide economic benefits for their work. The result of these creations, civilized society recognizes that those who create can control for beneficial purposes.¹

Indonesia is one of the countries that has signed the agreement to form a world trade organization, namely the Agreement on the Establishing World Trade Organization (WTO) and includes an agreement on trade aspects related to intellectual property rights (Agreement on Trade Related Aspect of Intellectual Property Rights).²

Intellectual Property (IP) is an output that arises from human intellectual abilities and creativity. So that in this case the object regulated in Intellectual Property (KI) is a work that is born from human intellectual abilities. The right to control of Intellectual Property (KI) lies in a person who produces an Intellectual Property (KI) which must be expressed in a tangible or physical form, not just an idea or idea. Intellectual Property (KI) is obtained with great sacrifice. Someone in producing intellectual property (KI) must be able to sacrifice cost, effort, and time so it is imperative if the intellectual property (KI) is legally protected.

Intellectual Property (IP) of course takes various forms, including copyrights, patents, trade secrets, layout designs of integrated circuits, protection of plant varieties, brands, and industrial designs. Ideas, thoughts, or ideas that are manifested in written form are automatically copyrighted. Copyright does not protect ideas, but protects the expression of those ideas.³ Based on Article 1 Paragraph (1) of Law Number 28 Year 2014 concerning Copyright, what is meant by copyright is: "Copyright is the exclusive right of a creator that arises automatically based on the declarative principle after a work is manifested in a tangible form without reducing the appropriate restrictions. with the provisions of laws and regulations. " A creator who has a copyright on his work certainly has full rights to

enjoy his work or can give permission to others to use his work. In this case, it is increasingly clear that copyright has the characteristics of moral rights and economic rights that will automatically be attached to the creator. Granting permission to other parties to duplicate their work is certainly done by using an agreement.

Legal protection regarding copyright in Indonesia is now able to provide protection for creators and their works. In addition, in accordance with Article 16 Paragraph (3) of Law Number 28 Year 2014 concerning Copyright, it is stated that "Copyright can be used as an object of fiduciary guarantee". Thus, the presence of copyright has very significant benefits for creators to be able to access credit facilities by guaranteeing that their work becomes the object of fiduciary security. Copyright is a part of Intellectual Property (KI) which understandably can be said that in Intellectual Property (KI) there are material rights and property rights for someone who owns it.

Fiduciary itself is the transfer of ownership rights to an object based on trust, provided that the object whose ownership rights are transferred remains under the control of the owner of the object.⁴ Therefore, in the transferred fiduciary is the right of ownership based on a sense of trust between the owner of the fiduciary object and the recipient of the fiduciary object. The object of this fiduciary is then used as a guarantee for the debtor to get a number of credits from the creditor. Article 1 Number 2 Law Number 42 Year 1999 concerning Fiduciary Guarantee states that:

"Fiduciary Security is a guarantee right for movable objects, both tangible and intangible and immovable objects, especially buildings that cannot be encumbered with mortgage rights as referred to in Law Number 4 of 1996 concerning Security Rights which remain in the control of the Fiduciary as collateral. for the settlement of certain money, which gives the Fiduciary priority over other creditors. "

Based on the explanation above regarding fiduciary security, the recipient of the fiduciary object is given a primary position compared to other creditors in the settlement of certain debts. The imposition of objects used as fiduciary objects must be made with a notarial deed that contains at least:⁵

- a. The identity of the fiduciary giver and recipient;
- b. Main agreement data guaranteed by fiduciary;
- c. A description of the objects that are the object of fiduciary security;
- d. Guarantee Value; and
- e. The value of the object which is the object of fiduciary security.

Regulations regarding the use of Intellectual Property (KI) as objects of fiduciary security have not been regulated separately in a statutory regulation. However, this can be anticipated by the use of Law Number 42 of 1999 concerning Fiduciary Security with its implementing regulations, namely Government Regulation Number 86 of 2000 as amended by Government Regulation Number 21 of 2015 concerning Fiduciary Security Registration Procedures and Fees for Making Guarantee Deeds. Fiduciary. Regulations regarding Intellectual Property which can be used as objects of fiduciary security can be used as a form of Government protection in providing legal protection to both debtors and creditors. But in practice, There are still many cases that Intellectual Property (KI) is not sufficient to serve as an object of fiduciary security. This can be seen from the many financial institutions in Indonesia that have not been able to accept Intellectual Property (KI) as an object of fiduciary guarantee, even though the Intellectual Property (KI) already has a license made through a notary deed and is an authentic deed. Based on the background of the problems that have been described previously, it is necessary to have a deeper understanding of the position of the notary's authentic deed, namely the intellectual property rights license (KI) which can be used as the object of fiduciary security, and it is necessary to establish separate laws and regulations regarding the license of property rights. intellectual as an object of fiduciary assurance in order to balance the dynamics of life. This can be seen from the many financial institutions in Indonesia that have not been able to accept Intellectual Property (KI) as an object of fiduciary security, even though the Intellectual Property (KI) already has a license made through a notary deed and is an authentic deed. Based on the background of the problems that have been described previously, it is necessary to have a deeper understanding of the position of the notary's authentic deed, namely the intellectual property rights license (KI) which can be used as the object of fiduciary security, and it is necessary to establish separate laws and regulations regarding the license of property rights. intellectual as an object of fiduciary assurance in order to balance the dynamics of life. This can be seen from the many financial institutions in Indonesia that have not been able to accept Intellectual Property (KI) as an object of fiduciary guarantee, even though the Intellectual Property (KI) already has a license made through a notary deed and is an authentic deed. Based on the background of the problems that have been described previously, it is necessary to have a deeper understanding of the position of the notary's authentic deed, namely the intellectual property rights license (KI) which can be used as the object of

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B. Formulation of the problem

1. How does a notary deed function in an intellectual property rights license from a fiduciary perspective?
2. What are the legal arrangements regarding intellectual property rights licensing in fiduciary insurance in Indonesia?

C. Research methods

The method used in this paper is a normative legal research method (doctrinal). This method is used to find a rule of law, legal principles and legal doctrines in order to answer the legal issues at hand.⁶This research is a prescriptive research. The approach used in this research is a statute approach by examining the laws and regulations governing Intellectual Property Rights Licenses (IPR), especially copyright which is used as an object of fiduciary security so that it can examine legal issues to find solutions to legal issues regarding legal arrangements and the legality function of a notary deed in issuing Intellectual Property Rights (HKI) licenses in the perspective of fiduciary security. The types of legal materials used by the author can be divided into two, namely primary and secondary legal materials. Primary legal materials include: Civil Code, Law Number 28 of 2014 concerning Copyright, Law Number 42 of 1999 concerning Fiduciary Guarantee,

and Government Regulation Number 86 of 2000 as amended by Government Regulation Number 21 of 2015 concerning Fiduciary Security Registration Procedures and Fiduciary Security Deed Making Fees. Meanwhile, secondary legal materials used to support primary legal materials in this study include books, journals, articles or other scientific writings, and internet media that have relevance to this writing. The collection technique used is literature study, which is done by reading, reviewing, and making notes from books, laws and regulations, documents and writings related to legal arrangements and the position of notary deeds used for issuing property rights licenses. Intellectual (IPR) in the perspective of fiduciary security.

D. Discussion

The history of the development of fiduciary institutions in Indonesia began during the Roman era with the issuance of Arrest Hoonggerechtshof on August 18, 1932. This fiduciary institution in Roman law is known as *fiducia cum creditore contracta* (which means a trust promise made by creditors).⁷The fiduciary institution, which had been formed at that time, experienced changes and developments. This is due to the influence of the urgent needs of small and medium entrepreneurs, retailers, wholesalers who at that time really needed credit or loans for their business. The need for credit requires a guarantee that can provide a sense of security to the capital owned by the capital provider (creditor) to the recipient of capital (debtor).

The problem that was born at that time stems from the need for a guarantee with goods without any transfer of power over the object or transfer of ownership rights over the object concerned. In other cases, at that time, it is necessary to have a form of guarantee for debt whose object is still a movable object but is carried out without giving up power over the object to the party receiving the guarantee (creditor). With the need to fulfill these needs, therefore the "vooraadpand" institution or what is now known as the fiduciary institution is considered as the solution. In fiduciary, there are several differences from pawning. One thing that distinguishes fiduciary from pawning is that what is submitted as collateral to creditors is property rights, while the goods can still be controlled by the debtor. So what happened in this event was that there was a *constitutum possessorium* handover. Fiduciary institutions emerged because the provisions of the law regulating pawning institutions (pand) contained many shortcomings, did not meet the needs of the community and could not keep up with the development of society.⁸Fiduciary itself comes from the word *fiduciair* or *fides*, which means trust,

where there is the transfer of ownership rights to objects in trust as a guarantee against the repayment of creditors' debts. The transfer of ownership rights to the object concerned is intended so that the fiduciary recipient (creditor) has a position that must be prioritized compared to other creditors in the repayment of debts by the debtor.

Based on the previous explanation it can be understood that in principle, fiduciary security is a collateral for material debt (both existing debt and future debt), which in principle provides movable property as collateral (but can also be extended to immovable property.) by granting control and enjoyment of the object of collateral for the debt to the debtor (by transferring the ownership rights of the object of collateral to the creditor, then the creditor gives back control and enjoyment of the object to the debtor in a fiduciary manner.⁹ Thus, if a number of previous debts have been paid off, the ownership and control of the objects used as the object of fiduciary security will be returned by the creditor to the debtor. Likewise, if the debtor is unable to pay off a number of his debts, then the object which is used as the object of fiduciary security must be sold and the proceeds from the sale will be used to pay off the debt. If there is an excess in the proceeds from the sale of the collateral object, the excess will be returned to the debtor, but if there is still a deficiency in the proceeds from the sale of the collateral object, the debtor still has an obligation to pay off the debt.

The regulation regarding fiduciary security stems from the jurisprudence in force in Indonesia, until 1999 a new law was established which deals with fiduciary guarantees, namely Law Number 42 of 1999 concerning Fiduciary Security. In accordance with Article 1 Paragraph (1) of the Law on Fiduciary Security, what is meant by Fiduciary is the transfer of ownership rights to an object based on trust provided that the object whose ownership is transferred remains under the control of the owner of the object. Meanwhile, the meaning of fiduciary security in Article 1 Paragraph (2) of the Fiduciary Guarantee Law, namely security rights over movable objects, both tangible and intangible and immovable objects, especially buildings that cannot be encumbered with mortgage rights as referred to in Law Number 4 of 1996 concerning Mortgage Rights which remain under the control of the Fiduciary, as collateral for repayment. certain debts, and gives the fiduciary priority over other credits. So it can be said that the creditor as the fiduciary recipient is the preferred creditor.

The principle that is always inherent in an object of fiduciary security, namely that the fiduciary security object cannot be split or combined, which

means that after binding one fiduciary guarantee to one or more objects of fiduciary security, then the fiduciary It cannot be divided into two fiduciaries, nor can two or more fiduciaries be combined into one. Fiduciary security is carried out by using an agreement. In this case the agreement in question is an assessment agreement, where the fiduciary agreement concerned will always follow the main agreement. In general, this fiduciary guarantee agreement is the result of a debt-receivable agreement made by previous debtors and creditors.

Initially, objects that are the object of fiduciary security are limited to tangible movable property in the form of equipment only. However, in its development, objects that become objects of fiduciary security are included in the assets of immovable, intangible and immovable objects.¹⁰ Intangible movable objects in this case, namely Intellectual Property (KI) in particular, which will be discussed further in this paper, are regarding copyright. The limitations in Article 499 of the Civil Code regarding objects, namely each item and every right that can be controlled by property rights. Thus, Intellectual Property (KI) is included as part of intangible property rights. In addition, copyright itself contains moral and economic rights that are automatically inherent from the time its creation is declared with several terms and conditions. The moral rights in question are rights that will always be attached to the creator without being changed in any way, even after the creator has died, the results of his creations will always be attached to him.

Copyright which is a part of Intellectual Property (KI) which has been specifically regulated in Law Number 28 of 2014 concerning Copyright. In accordance with Article 1 Paragraph (1), what is meant by copyright is "the exclusive right of a creator that arises automatically based on the declarative principle after a work is manifested in a tangible form without reducing restrictions in accordance with the provisions of laws and regulations". Meanwhile, those who own the copyright are, of course, legally copyright holders in accordance with Article 1 Paragraph (4), where the copyright holder is "the creator as the copyright owner, the party who receives the right legally from the creator, or other parties who receive more. continue the rights of the party who received these rights legally".¹¹

With the development of the times, the financing process in our social life will also develop. Currently, there are opportunities for creators to make their creations an object of financing guarantee. In accordance with Article 504 of the Civil Code which states that, each object is a movable object or an immovable object, according to the provisions of the

two sections. It is also said that material rights are absolute rights over something tangible, but there are absolute rights whose objects are not tangible objects and that is what is called intellectual property rights.¹² This is linear with the existence of Article 16 Paragraph (3) which states that copyright is an intangible movable object that can be used as an object of fiduciary security. Copyright based on the Civil Code, the Copyright Law or according to experts is an intangible movable object. Therefore, copyright can be used as an object of guarantee because copyright is a category of immaterial objects that have economic value.¹³

The previous understanding regarding fiduciary security in Article 1 Paragraph (2) of Law Number 42 of 1999 concerning Fiduciary Security has explained that fiduciary security includes collateral rights over movable objects, whether tangible or intangible. If it is related to Law Number 24 of 2014 concerning Copyright which explains that copyright is an intangible movable object, then it is clear that there are legal rules that copyright can be used as an object of fiduciary guarantee. Fiduciary imposition must use an instrument that is often known as a "fiduciary security deed". The fiduciary guarantee deed must be made by a notary and be in the form of a notary deed. Before discussing the fiduciary guarantee deed used in a fiduciary agreement, then it must be understood beforehand that the copyright to be the object of fiduciary guarantee must first have a license to intellectual property rights if the creator grants the right to use his / her work to someone else. When there is already a license related to a copyrighted work that will be used as an object, then it can only be continued with the creation of objects that will be used as fiduciary collateral.

Regulations regarding licenses as objects of fiduciary guarantee have clearly been established, but in practice financial institutions in Indonesia are still reluctant to quickly process or even accept debtors who use intellectual property rights (copyright) licenses as objects of fiduciary security. One reason for this is the difficulty in measuring the economic value contained in these works. However, this made Sri Mulyani think about how to determine the economic value of a copyrighted work so that it could be used as collateral which would certainly make it easier for debtors to get an injection of funds for their business or their needs. The determination of economic value in a creation can be seen from several approaches, including:¹⁴

1. The market approach, which is an approach that provides a systematic framework for estimating the value of intangible assets based on an

analysis of actual sales and / or tangible license transactions that are comparable to the object.

2. The income approach, which is an approach that provides a systematic framework for estimating the value of intangible assets based on the capitalization of economic income or their present or future value. The economic value of income comes from the use, license, or rental of the intangible object.
3. The cost approach, which is an approach that provides a systematic framework for estimating the value of intangible assets based on economic substitution principles that are commensurate with the costs to be incurred as a comparable substitute as the utility function.

Discussions regarding the Intellectual Property (KI) system will always recognize a legal entity in the form of a "license" and generate financial consequences in the form of "royalties". Licenses granted by owners or holders of intellectual property rights (creators and / or inventors) certainly require the assistance of a notary by using the principle of prudence. The main thing behind this principle is related to the extension and the period for which the license is granted. There is an "intention / intention" to minimize the scope of the license holder who turns out to have legal or illegal intentions to make modifications and imitations which the intellectual property rights owner deems to threaten the large profits they can have. The license has several elements, including the following:¹⁵

1. There is a license granted by the right holder;
2. The license is given in the form of an agreement, namely in the form of a notary deed;
3. The license is the granting of the right to enjoy economic benefits (which are not transferring rights);
4. The license is given for rights that are given protection; and
5. The permission is tied to certain times and conditions.

Intellectual property rights license in this case allows the owner of the right to give economic rights to others as rights holders. This license is of course made with an authentic agreement which is very important. Based on Article 5 Paragraph (1) of Law Number 42 of 1999 concerning Fiduciary Security, it is stated that the imposition of objects with fiduciary guarantees is made by a Notary Deed in Indonesian and is a fiduciary guarantee deed. Notary deed is an authentic deed which is also explained in Article 1868 of the Civil Code that an authentic deed is a deed which is in the form determined by law, made by or in front of public officials who have the power to do so on the spot. where the deed was made.

An intellectual property right license which will then be used as an object of fiduciary security must be duly made by an authorized notary in the form of a notarial deed. This notary deed has legal force or absolute proof and is binding. A notary deed is a means of written evidence or a major proof of evidence so that this document can be used as evidence in a trial which has a very important position, and this document is perfect evidence so that it does not need to be proven by other evidences as long as it cannot be proven untrue. In other words, it is very clear that the function of a notary deed,

The intellectual property rights license, if in the future there is a dispute or dispute between the parties and requires the case to go to the trial stage, the license in the form of an authentic deed is used as binding evidence, where the truth of something or things written in the deed authenticity must be able to be recognized by the judge. If the intellectual property rights license made by the notary is linked to the object of the fiduciary guarantee, then the license serves to provide real truth, that the object of creation has become the license recipient, which will then serve as a fiduciary guarantee deed. Thus, the party who will be responsible for paying off debts and everything else is no longer with the creator / inventor,

. Arrangements regarding intellectual property rights licenses are made prior to registration of fiduciary security. The license must be made by a notary for the parties by producing a notary deed. The intellectual property rights license that is meant to be an authentic deed whose validity can be recognized. This can be done because the license of intellectual property rights is a very important "main point" in the event that a dispute occurs regarding objects or objects that are guaranteed for fiduciary security. After this is done, it can be continued with the existence of a fiduciary guarantee procedure in accordance with the prevailing laws and regulations. The process and stages of fiduciary loading are carried out in the following ways:¹⁶

1. The first process, namely by making several principal agreements in the form of a credit agreement made by a notary;
2. The second process, namely the imposition of objects with fiduciary security which is marked by the making of the Fiduciary Security Deed (AJF), which contains the day, date, time of manufacture, the identity of the parties, data on the principal fiduciary agreement, a description of the fiduciary object, the value of guarantee and the value of the fiduciary security object. ; and
3. The third process, namely the registration of the Fiduciary Security Deed (AJF) at the fiduciary registration office, which will then issue a

Fiduciary Guarantee Certificate to creditors as fiduciary recipients.

The imposition of objects that are the object of fiduciary security is important to be presented in the form of a notarial deed. The object of guarantee, namely the intellectual property rights license, in this case is copyright, which is a guarantee that will be used by the creditor for security if at any time the debtor fails to perform. However, it is different if there is an imposition on copyright, because even though copyright protection is not given to ideas or ideas because a copyright work must have a distinctive form, is personal and shows authenticity as a creation that was born based on ability, creativity, or expertise so that the work can made, read, heard, but in fact in copyright it is not an important object but the right inherent in the object which is protected.¹⁷

The procedure for registering fiduciary security is clearly regulated in Article 11 through Article 18 of Law Number 42 of 1999 concerning Fiduciary Security. In the case of registration of intellectual property rights (copyright) licenses, it must refer to the provisions contained in Government Regulation Number 86 of 2000 as amended by Government Regulation Number 21 of 2015 concerning Fiduciary Security Registration Procedures and Fiduciary Security Deed Making Fees. This process can be done online in order to create a one-day service and minimize the spike in registrations that exceed the limit every day.¹⁸As previously explained, the registration of fiduciary guarantees in this case is an intellectual property right license (copyright) must be made a notarial deed. If the registration of the fiduciary security is not made with a notarial deed, then the fiduciary guarantee cannot be registered.¹⁹Based on the explanation above, fiduciary guarantees must obtain protection and legal certainty. Therefore, it is very important if the fiduciary guarantee is made in the form of an authentic deed through a notary for strong evidence before the law.

E. Conclusion

The notary deed has a function as a perfect proof tool to prove the truth between the license holder acting as the debtor and the creditor. With the existence of this notary deed, which makes the evidence in court authentic, so that judges must also acknowledge their existence and truth. In addition, without a notary deed in an intellectual property rights license (copyright), a license holder cannot apply for credit or loans to financial institutions in Indonesia.

The development of the era gave birth to the concept of fiduciary guarantee also following progress. Intellectual Property (KI) in this case is copyright which is an intangible movable object that

can currently be used and used as an object of fiduciary security in Indonesia. Likewise, if there is a license agreement between the copyright owner and the licensee. Then the license can be used as an object of fiduciary security. Registration of fiduciary security can be carried out based on the provisions of the applicable laws and regulations and must be in the form of an authentic deed through a notary. Thus, copyright as an intellectual property legally and legally can be the object of fiduciary security.

It is necessary to make a notary deed in an intellectual property rights license to be used as valid and perfect evidence through an authorized notary public. This is done to avoid disputes or disputes that occur in the future between licensees, copyright owners, and financial institutions.

Increase understanding of the market approach method, the income approach, and the cost approach in the implementation of fiduciary insurance by using intellectual property rights licenses for financial institutions in Indonesia so that economic development and development in Indonesia can progress further.

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